IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THOMAS S. RAINEY, a married person and STEPHEN N. HIATT, a married person, Appellants, v. WASHINGTON STATE HORSE RACING COMMISSION, and ROBERT LEICHNER, Executive Secretary, and the STATE OF WASHINGTON, Respondents.	No. 33688-0-II UNPUBLISHED OPINION

ARMSTRONG, J. -- Thomas Rainey and Stephen Hiatt appeal the trial court's summary judgment dismissal of their whistleblower retaliation claims against the Washington State Horse Racing Commission. They argue that the trial court erred in applying the *McDonnell Douglas*[1] burden-shifting analysis rather than the statutory presumption of retaliatory action that applies to state employees' retaliation claims. But the Commission offered nonretaliatory reasons for its actions, which Rainey and Hiatt did not rebut. Thus, Rainey's and Hiatt's claims fail and, therefore, we affirm.

[1] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

FACTS

The Emerald Downs Board of Stewards is a three-member panel of seasonal employees that oversees and officiates horse races at the Auburn racetrack. Hiatt and Rainey were both stewards at Emerald Downs. Rainey was the presiding steward at Emerald Downs in 2001, and in 2004. Hiatt presided in 2002, and another steward presided in 2003.

Under former WAC 260-24-510(1)(a) (2001),[2] the stewards are responsible to the Commission for the conduct of the races during a meet.[3] The stewards also make decisions regarding alleged rule violations. The stewards' authority includes overseeing all racing officials, track management, licensed personnel, other persons responsible for racing conduct, and patrons. Former WAC 260-24-510(1)(c) (2001). The stewards also interpret the rules and resolve conflicts or disputes about violations of the rules of racing. Former WAC 260-24-510(1)(e)-(g) (2001). Additionally, the stewards have the authority to initiate investigations into alleged misconduct or rule violations and to discipline violators. Former WAC 260-24-510(1)(e)-(h) (2001). Rainey and Hiatt describe their authority as "plenary" and state that they were responsible for ensuring that the entire process of regulated racing, from the training of horses through the delivery of money from wagers, is fair and above-board. Clerk's Papers (CP) at 258.

[2] We apply the Washington Administrative Code provisions that were in effect at the time of the events in this case. The Commission has since amended several provisions, but those changes are irrelevant to this opinion.

[3] A "meet" is the period of time from the first race of the racing season until the last race of the season. CP at 258.

Washington's horse racing industry flourished in the 1980s with three tracks where patrons could place bets; Longacres in Tukwila, Playfair in Spokane, and Yakima Meadows. When Rainey began working as a steward, these three tracks conducted a combined total of 315 days of live racing. The increasing popularity of the state lottery, gaming casinos, and other forms of gambling, along with other market forces, caused a decline in the horse racing industry throughout the 1990s. Longacres closed in 1992; Yakima Meadows closed in 1998; and Playfair closed in 2000. By 2001, Emerald Downs, which opened in 1996, was the only for-profit race track operating in Washington. Emerald Downs conducted 89 days of live racing that year.

The horse racing industry's decline caused a decline in commission revenues. The Commission's primary source of funding is a tax on the wagers placed on horse races.[4] In 1991, the tax generated $10,749,955 for the Commission. By 2001, the tax generated only $1,832,187 for the Commission. That year, the Commission operated with a balance of only $443,385. During 2000 and 2001, the Commission's expenditures nearly exceeded its revenues.

In the 1990s, the Commission approved off-track betting at satellite locations.[5] The stewards are responsible for monitoring operations at the numerous off-track betting sites for compliance with commission rules. In August 2000, Rainey voiced concerns to Commission Executive Secretary[6] Bruce Batson about the licensing of personnel at the off-track satellite sites. Neither Batson nor the Commission acted on Rainey's concerns. The stewards later ordered the

[4] This tax is called the pari-mutuel handle tax.

[5] An off-track betting site is a legal wagering location that receives a video feed of the races occurring at Emerald Downs and other race tracks around the country.

[6] The Executive Secretary is essentially the Commission's Chief Operating Officer.

commission security inspector to investigate an individual who was purportedly licensed by the Commission to work at a satellite location. Batson halted the stewards' investigation and said that he would continue the investigation. Batson then ordered the security inspector to conduct an investigation, the results of which the Commission made available to the stewards six months after the stewards initially ordered their investigation.

In May 2001, Rainey and Hiatt filed a whistleblower complaint with the Washington State Auditor. The complaint alleged that (1) Batson improperly intervened and halted the stewards' investigation into the licensing status of racing association employees at satellite locations, (2) the Commission had not ensured that all Northwest Racing Association employees had the required licenses, and (3) some commission employees, and some commissioners themselves, did not have licenses required by the Commission's administrative rules.

Some time after Rainey and Hiatt filed the whistleblower complaint, the Commission reduced the number of days that the stewards worked in the off-season. Stewards had typically worked through the winter months following the racing season. During these months, the stewards reviewed license applications for the upcoming year and worked on regulatory changes for the industry. The Commission limited the stewards' off-season work and approved the stewards to work for only 21 days during the off-season.

During a 2001 Emerald Downs race, the stewards saw a suspicious act by a jockey. The stewards instructed security personnel to search the jockey in the winner's circle, which is in full view of the public. The jockeys were extremely unhappy with the stewards' decision to order the public search; they threatened to refuse to ride for the rest of the day. Shortly after the incident, Batson issued a performance expectation memorandum to the stewards outlining his expectations for their future conduct. The Commission put a

copy of the memo in Rainey's, Hiatt's, and Moore's[7] personnel files.

At some time during the same meet, the stewards requested information from the commission veterinarians concerning the veterinarians' pre-race testing of horses scheduled to race that day. The veterinarians objected to the request and complained to Batson, who sided with the veterinarians. The Commission initially agreed with the stewards' request, but after taking public comment during a 2002 meeting, the Commission decided, as a matter of policy, that the veterinarians did not have to give the stewards the pre-race inspection information.

In May 2003, new Executive Secretary Robert Leichner hired a temporary employee to review and revise the Washington Rules of Racing.[8] The Commission wanted a report outlining the similarities and differences between the Washington rules and the national model rules. The Commission terminated the temporary employee shortly after she completed the report.

As of 2004, both Rainey and Hiatt had resigned from their steward positions with the Commission.

Rainey and Hiatt filed a complaint alleging retaliation, invasion of privacy, and publication in false light. The Commission moved for partial summary judgment on the invasion of privacy and publication in false light claims. After Rainey and Hiatt agreed to voluntarily dismiss those claims, the Commission moved for summary judgment on the whistleblower retaliation claim.

[7] Doug Moore was the third steward at Emerald Downs at that time.

[8] The Washington Rules of Racing are codified in chapter 260 WAC.

Both parties moved to strike portions of the other's materials. The court noted that it did its "best to disregard those portions [of the materials submitted for the summary judgment motion] that were offensive to the rules of evidence and the requirements of the kind of factual showing which must be made in support of or opposition to a summary judgment motion." Report of Proceedings (RP) at 4. The trial court concluded that *Milligan v. Thompson*, 110 Wn. App. 628, 638, 42 P.3d 418 (2002), required the court to analyze Rainey's and Hiatt's whistleblower retaliation claims using the *Hill v. BCTI* burden-shifting analytical framework.[9] *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180-83, 23 P.3d 440 (2001) (citations omitted). The trial court ruled that Rainey and Hiatt presented sufficient evidence of adverse employment action to establish a prima facie case of retaliation. But the court concluded that Rainey and Hiatt had not produced evidence that the Commission's nonretaliatory explanations for its employment decisions were pretexts. The court further stated that the Commission showed that the alleged retaliatory actions were generalized and affected not only Rainey and Hiatt, but others in their classification and other commission employees outside of Rainey's and Hiatt's classification. Finally, the court ruled that no reasonable juror could find that the Commission's conduct toward Rainey and Hiatt was retaliatory, particularly given the time between the whistleblower complaint and the adverse actions.

Accordingly, the trial court granted the Commission's motion and dismissed Rainey's and Hiatt's retaliation claim.

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[9] In retaliation cases, the *Hill v. BCTI* protocol requires the plaintiff to first present a prima facie case of retaliation. Once the plaintiff makes his prima facie case, the employer must come forward with a legitimate, nonretaliatory reason for the employment action to rebut the presumption of retaliation. If the employer satisfies its burden, the plaintiff then must present evidence establishing that the employer's proffered reason for the employment action is pretextual. *Milligan*, 110 Wn. App. at 638.

ANALYSIS

I. Standard of Review

We review a summary judgment de novo. *Korslund v. Dyncorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005) (citing *Hubbard v. Spokane County*, 146 Wn.2d 699, 707-08, 50 P.3d 602 (2002)). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). In testing the propriety of a summary judgment, we consider all facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (citing *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 515-16, 799 P.2d 250 (1990)).

The nonmoving party may not rely on speculation, argumentative assertions, or conclusory statements. *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 848, 92 P.3d 243 (2004); *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 430, 38 P.3d 322 (2002).

Summary judgment affidavits must (1) be made on personal knowledge, (2) set forth facts that would be admissible in evidence, and (3) show that the affiant is competent to testify to the matters stated. CR 56(e); *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988). Inadmissible hearsay evidence cannot be considered in ruling on a motion for summary judgment. *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986) (citing *Charbonneau v. Wilbur Ellis Co.*, 9 Wn. App. 474, 512 P.2d 1126 (1973)).

II. Whistleblower Retaliation

A. Applicable Analysis

Rainey and Hiatt contend that the trial court improperly applied the burden-shifting analysis announced in *McDonnell Douglas*--and adopted in Washington in *Grimwood v. University of Puget Sound*, 110 Wn.2d at 362-63--to their retaliation claim. They argue that the trial court's use of that burden-shifting analysis imposed additional requirements that they, as state employees, did not have to prove under the whistleblower statutes.[10] Rainey and Hiatt maintain that a state employee establishes a prima facie case of retaliation under the whistleblower statute when he shows a violation of any of the statute's enumerated reprisal or retaliatory actions. *See* RCW 42.40.050. They argue that, under the whistleblower laws, the employer may rebut the presumption of retaliation by proving, *by a preponderance of the evidence*, that the employer's reasons for the employment action were unrelated to the employee's whistleblower status.

The Commission argues that the *McDonnell Douglas* burden-shifting analysis applies to whistleblower retaliation claims. The Commission further contends that even if the *McDonnell Douglas* burden-shifting analysis does not apply, the distinction between the case law and the whistleblower statute makes no difference in this case.

No Washington court has addressed this issue.[11] RCW 42.40.050, which applies to state agencies as employers, provides that:

> (1) Any person who is a whistleblower . . . and who has been subjected to workplace reprisal or retaliatory action is presumed to have established a cause of action for the remedies provided under chapter 49.60 RCW. For the purpose of

[10] We refer to chapter 42.40 RCW as the "whistleblower" statute.

[11] In *Milligan*, 110 Wn. App. at 638-39, we applied the *McDonnell Douglas* burden-shifting analysis to a state employee's retaliation claim against his employer, but the parties did not argue that the statute controlled over *McDonnell Douglas*.

> this section "reprisal or retaliatory action" means but is not limited to any of the following: . . . (d) Refusal to assign meaningful work; (e) Unwarranted and unsubstantiated letters of reprimand or unsatisfactory performance evaluations; . . . (g) Reduction in pay; (h) Denial of promotion; . . . (k) Denial of employment; (l) A supervisor or superior encouraging coworkers to behave in a hostile manner toward the whistleblower; and (m) A change . . . in the basic nature of the employee's job, if [the change is] in opposition to the employee's expressed wish.
> . . . .
> (2) The agency presumed to have taken retaliatory action under [RCW 42.40.050(1)] may rebut that presumption by proving by a preponderance of the evidence that the agency action or actions were justified by reasons unrelated to the employee's status as a whistleblower.

RCW 42.40.050(1), (2).

RCW 42.40.050(2)'s language differs from the *McDonnell Douglas* burden-shifting analysis by requiring the agency to show, by a preponderance of the evidence, that the agency's action was justified by reasons unrelated to the employee's whistleblower status. Under *McDonnell Douglas*, the employer must simply articulate a legitimate nonretaliatory reason for the adverse employment action. *Wilmot v. Kaiser Aluminum and Chem. Corp.*, 118 Wn.2d 46, 70, 821 P.2d 18 (1991). A *McDonnell Douglas* employee must then offer evidence that the employer's explanations are pretext. RCW 42.40.050(2) says nothing about the state employee's burden, if any, to counter the state employer's nonretaliatory reasons for its conduct. *McDonnell Douglas* deals with an obligation to produce evidence; RCW 42.40.050(2) deals with an obligation to persuade by a preponderance of the evidence.

Here, we reach the same result under the statute or *McDonnell Douglas*. Under *McDonnell Douglas*, Rainey and Hiatt had to produce evidence that the Commission's explanation of its decisions was pretext. Rainey produced no pretext evidence. Under the statute, Rainey and Hiatt had no obligation to rebut the Commission's explanation of its conduct.

But if they did not, they ran the risk that the Commission's explanation would prove a nonretaliatory motive as a matter of law. We conclude that it does.

Rainey and Hiatt claim several incidents of retaliatory action.

1. Attendance at Commission Meetings

On March 16, 2001, Batson told Rainey to stop attending commission meetings even though Batson had instructed Rainey to attend the meetings in previous years. The Commission's "Classification Questionnaire" for the steward position states that, during the racing season, a steward's duty includes "attend[ing] WHRC commission meetings and testify[ing] as necessary."[12] CP at 296. Rainey argues that Batson's directive constituted a "retaliation or reprisal" action because the Commission would no longer pay him for attending commission meetings. *See* RCW 42.40.050(g), (k); CP at 377. Rainey argues that a question of fact exists regarding whether Batson's directive constituted a retaliatory action.

Rainey and Hiatt filed their whistleblower complaint in early May 2001. Batson told Rainey to stop attending commission meetings almost two months earlier. Rainey does not explain how Batson's directive about attending meetings could possibly have been motivated by an event two months in the future. Moreover, Batson stated that financial concerns dictated that stewards should no longer attend commission meetings when their attendance was "merely for the sake of staying informed." CP at 154. And Rainey and Hiatt offered no evidence to counter the Commission's story of financial difficulties. We conclude that Rainey and Hiatt failed to offer any pretext evidence on this claim and that the Commission proved by a preponderance of the

[12] The Commission "Classification Questionnaire" for the steward position states that, during the off-season, stewards are to "[a]ttend WHRC commission meetings and testify as *necessary*." CP at 296 (emphasis added).

evidence that it acted without a retaliatory motive in excusing Rainey from attending commission meetings.

2. Pre-Race Veterinarian Inspection Reports

Early in the summer of 2001, the Emerald Downs' stewards requested that the racetrack veterinarians--also commission employees--supply the stewards with a list of the horses the veterinarians inspected before the races each morning. Rainey said that the stewards wanted the information "to be aware of which horses had actually been tested, and . . . [to] select horses for post-race testing" that the veterinarians had not tested earlier. CP at 263. The veterinarians viewed the information as confidential; therefore, they denied the stewards' request.

In a letter to then Commission Chair Delores Sibonga, the veterinarians objected to the stewards' request. The veterinarians stated that the list could be used for improper purposes if it fell into the wrong hands. They also said that they "were fearful of the legal ramifications of the stewards' request if a horse or rider were injured." CP at 178 n.60. Batson supported the veterinarians' request, expressing his surprise that "the stewards had sought to implement such a major policy change" without first discussing the issue with the Commission. CP at 155. With Batson's support, the veterinarians avoided complying with the stewards' request by calling for the Commission to review the issue.

Some time after the stewards requested the pre-race veterinarian information, the Commission summarily fired Batson and hired Gary Christenson as the interim Executive Secretary. Christenson reversed Batson's decision to have the Commission review the stewards' request. At that time, the Commission supported the stewards' request and ordered the veterinarians to provide the requested list of information to the stewards.

But the Commission revisited the issue

during its meetings in August 2002, and April 2003. After taking public comment, the Commission decided not to provide the stewards with the pre-race inspection information. The Commission stated that (1) based on the comments from the stakeholders, the Commission believed the decision to deny the board of stewards this information was in the best interests of racing, and (2) the Commission wanted the stewards to make their own decision about whether a horse should be tested for drugs independent from any list of horses official veterinarians inspected. The Commission's decision precluded all stewards from receiving the requested information; not just Rainey and Hiatt.

Rainey and Hiatt argue that the stewards had "plenary power" and had the authority to determine if any horse was eligible to participate in a race. CP at 258. Rainey said that this power gave the stewards authority to review the veterinarians' information. Further, WAC 260-24-550(13) provides that "[t]he official veterinarian(s) shall . . . [b]e available to the stewards prior to scratch time each racing day at a time designated by the stewards to inspect any horses and report on their condition as may be requested by the stewards." Rainey and Hiatt argue that Batson's support of the veterinarians and the Commission's decision to deny them the information established a cause of action for whistleblower retaliation under RCW 42.40.050(1).[13]

This claim too fails. The objections to the stewards' request for pre-race inspection information on the horses came first from the veterinarians, not from Batson or the Commission. And although Batson sided with the veterinarians and may have frustrated the stewards' attempt

[13] Rainey and Hiatt do not say under which subsection of RCW 42.40.050(1) their claim involving the veterinarians falls. They merely list Clerk's Papers at 263 and 283 as instances where a supervisor encouraged workers to behave in a hostile manner toward the whistleblowers. *See* RCW 42.40.050(1)(l) (stating that a whistleblower establishes a cause of action where he shows that a supervisor or superior encouraged coworkers to behave in a hostile manner toward the whistleblower).

to receive the information, Batson's replacement reversed the decision and took the issue to the Commission. Originally, the Commission agreed with the stewards. But after receiving public comment and considering the issue at two of its meetings, the Commission sided with the veterinarians, explaining its policy reasons for disallowing the stewards' request. Thus, the Commission's unrebutted story is of a dispute between the veterinarians and the stewards, a disagreement between Batson and his successor, and a commission decision that originally favored the stewards but then sided with the veterinarians. Missing from the story is any hint that the Commission was motivated to retaliate against Rainey and Hiatt during these shifting positions. We conclude that Rainey and Hiatt failed to prove a claim of commission retaliation in this incident.

3. Written Performance Expectations After Jockey Search

In September 2001, the Emerald Downs' stewards ordered the commission investigator to search a winning jockey after the stewards observed behavior they viewed as suspicious. Commission investigator Donald Weeks searched the jockey in the winner's circle--in full view of the public--and not in the jockey's room. The jockeys expressed their dissatisfaction with the public search and demanded an explanation. They also threatened a walk-out and asked to meet the stewards to discuss the issue.

Rainey met with the jockeys later that day. Emerald Downs' president and vice president also attended the meeting. The jockeys agreed to ride the day's remaining races but asked for a follow-up meeting with the stewards to agree on guidelines for similar searches in the future. The jockeys' guild, Emerald Downs' president and vice president, and the Washington Horsemen's Benevolent & Protective Association's executive director all wrote letters to the Commission asking the Commission to review the incident

and evaluate the stewards.

Immediately after the stewards met with the jockeys, Batson voiced his displeasure with the stewards' search order and their meetings with the jockeys and Emerald Downs' management. Batson also wrote a memo of performance expectations and placed the memo in Rainey's, Hiatt's, and Moore's personnel files. Hiatt claims that the memo was "completely unwarranted and retaliatory" and that the memo "constituted a form of reprisal." CP at 283. Rainey and Hiatt argue that the memo was an unwarranted and unsubstantiated letter of reprimand and that the memo constituted a retaliatory action under RCW 42.40.050.

But the memo expressly states, "This memo is not intended as a reprimand but rather as a means of conveying [Batson's] expectations for the future." CP at 188. And it also says, "The purpose of this memo is to convey [Batson's] concerns regarding [the jockey search] incident and to provide [the stewards] with clear directions so that similar problems can be avoided in the future." CP at 188.

Again Rainey and Hiatt fail to provide any evidence of a retaliatory motive. The dispute started not with the Commission but with the jockeys. Batson sided with the jockeys and wrote a memo to all three stewards stating his expectations for future incidents; and the memo expressly said it was not a reprimand. Rainey's and Hiatt's complaint that the memo was "unwarranted and retaliatory" is conclusory and does not state any specific facts that would show a retaliatory motive. CP at 283; *see Overton*, 145 Wn.2d at 430.

4. Chief Pari-Mutuel Inspector Job Opening

Rainey and Hiatt contend that the Commission denied them a promotion, contrary to RCW 42.40.050(1)(h), when the Commission failed to inform them of an opening for the Chief Pari-Mutuel Inspector position within the

agency. Rainey said that he did not know the position was open until he returned to work for the 2002 meet, and by then, Batson had created and filled the position. Rainey believes the position would have been a good fit because "[i]t would have allowed [him to spend] more time with [his] family, and [he] would have liked the new challenge." CP at 109. And Hiatt said that he would have been interested in the position, even if it paid less money, because "it was apparent to [him] that the position of Steward as [he] had known it, was being systematically stripped of the authority and duties it had had." CP at 282-83. Hiatt said the job also interested him because the position "would have limited the opportunity for the Executive Secretary or the Commission to criticize [his] actions" as they had when he was a steward. CP at 283. The Commission disputes Rainey's and Hiatt's claim that they did not receive notice of the position. Former Commission Human Resources Manager John Calhoun stated that his office mailed a notice of the position to each commission employee, including Rainey.

According to the Department of Personnel position announcement, the Chief Pari-Mutuel Inspector could receive a maximum salary of $44,724 per year. The Commission ultimately paid the person it selected $40,512 per year. Rainey received $51,555 during the 2002 racing season plus an additional $4,470 in unemployment compensation during the off-season, for a total salary of $56,025. The record shows, and Rainey admits, that the Chief Pari-Mutuel Inspector received a lower salary than stewards.

Rainey and Hiatt presented no evidence that the Chief Pari-Mutuel Inspector position would have been a promotion. *See* RCW 42.40.050(1)(h). Calhoun said that "had . . . Rainey obtained the non-seasonal . . . Chief Pari-Mutuel Inspector position, he would have worked more hours and received less income in 2002 than he did as a Racing Steward." CP at 134. Rainey and Hiatt offered no evidence to the contrary.

Accordingly, they failed to make a prima facie case that the Commission's conduct, assuming it did not give them notice, amounted to adverse employment conduct. *See* RCW 42.40.050(1)(h).

5. Lost Work

Rainey and Hiatt point to several incidents that they claim constituted a (1) refusal to assign meaningful work, (2) reduction in pay, (3) denial of employment, or (4) a change in hours or days of work. *See* RCW 42.40.050(1)(d), (g), (k).

i. Background Checks, Review, and Issuance of Licenses

Each year the stewards conducted background checks before the Commission granted licenses to those seeking work in the horse racing industry. Former WAC 260-36-010 (1961); Former WAC 260-36-020 (1989); Former WAC 260-36-030 (1991). Commission licenses expired on December 31 each year. Former WAC 260-36-080(1) (2001). According to Hiatt, the race track is "like a small city, and anybody who is performing duties there needs to be licensed by the racing commission." CP at 96.

The stewards historically began working about a month before the meet began in March or April and continued until they finished all of the licensing matters in November or early December. Rainey said that during the period after the meet's conclusion, the stewards would not work full-time, but worked two or three days each week. According to Rainey, that work included reviewing licenses and revising or reviewing changes in the administrative code or potential legislation. Rainey stated that because the Commission's licenses expired on December 31, each person had to re-apply annually. Rainey explained that the stewards had to review the license applications of new applicants and also had to ensure that those who re-applied were still eligible to participate.

Before the 2002 racing season started,

Batson decided that it was no longer necessary for the stewards to physically conduct background checks. The stewards apparently conducted the checks using information received from a Washington State Patrol computer database. Batson said that, at the time of his decision, the Chief of Security was qualified to conduct background investigations. Batson intended for qualified, but lower paid, clerical staff to physically retrieve and review the background information from the Washington State Patrol. He wanted the Chief of Security to then review the results of the clerical staff's reviews. Batson intended that the stewards could perform any necessary further review once they resumed work in early April.[14] Batson explained that he formulated this new approach so the Commission could operate more efficiently and save money.

Rainey and Hiatt contend that Batson's directive limited the time the stewards had available to accomplish their duties to 21 days per year outside of the time for the meet. Accordingly, Rainey and Hiatt argue that the Commission retaliated against them and that their claims established a presumption of whistleblower retaliation under RCW 42.40.050(1). Specifically, Rainey and Hiatt argue that Batson's directive constituted (1) refusal to assign meaningful work, RCW 42.40.050(1)(d); (2) reduction in pay, RCW 42.40.050(1)(g); and, (3) denial of employment, RCW 42.40.050(1)(k). Rainey and Hiatt argue that a "change in hours or days of work" falls under RCW 42.40.050(1) since the statute states that the enumerated reprisal or retaliatory actions are not exclusive. Br. of Appellant at 22.

[14] According to WAC 260-24-510(2), the stewards' period of authority begins "ten days prior to the beginning of each race meet, or at such other time as is necessary in the opinion of the executive secretary."

But as we have discussed, we need not decide whether Rainey's and Hiatt's claims fall within RCW 42.40.050 as they argue. Batson declared that his decision was based on financial concerns and that when the Commission made cutbacks, all stewards were subjected to the same cutbacks. Batson stated that his decision was part of an attempt to effectively manage the Commission's responsibilities and limited financial resources. And Rainey's declaration states that Batson told Hiatt and him that "the financial situation of the agency could not sustain [their] extended working." CP at 262. The declaration of Margo Krautkremer, then Commission Financial Manager, supports Batson's justification. Krautkremer said that the "financial reality" that the agency was "spending more money than the agency was collecting in revenues" prompted her to advise Mr. Batson not to offer employees an opportunity to work the winters of 2000-01 and 2001-02. CP at 193. She said that these decisions had nothing to do with retaliation for the stewards' filing of a whistleblower complaint in May 2001.

Rainey and Hiatt do not dispute the dramatic decline in commission revenue--from approximately $10,800,000 in 1991 to approximately $1,832,000 in 2001. Nor do they offer any evidence that Batson formulated his new plan for allocating off-season work for any reason other than the Commission's financial condition. Thus, Rainey and Hiatt fail to show pretext or rebut in any way the Commission's explanation of these financial decisions.

ii. Off-Track Betting Investigation

In August 2003, Commission Investigator Donald Weeks informed the stewards that there had been thefts at three off-track betting parlors. The stewards asked Weeks to investigate the allegations, but the Commission called off the investigation pending the outcome of law enforcement's criminal investigation. Rainey

and Hiatt maintain that the Commission's conduct in calling off Weeks's investigation detrimentally impacted the stewards because the investigation would have led to hearings, and those hearings would have provided work for the stewards during the non-live racing season.

Rainey and Hiatt argue that they established a cause of action under the whistleblower statute because the Commission's conduct constituted (1) a refusal to assign meaningful work and (2) a denial of employment. RCW 42.40.050(1)(d), (k).

Commission Administrative Services Manager Robert Lopez said that he told Weeks not to investigate the thefts until the local law enforcement agency notified the Commission that they had completed their investigation. Lopez said the agency believed that criminal matters took precedence over the administrative investigation. Lopez noted that after police concluded the criminal investigations, the Commission assigned the agency investigator to complete the administrative investigation. He said that the investigator responsible for inspecting off-track betting sites in eastern Washington conducted the investigation.

Again, Rainey and Hiatt claim that the Commission denied all stewards work opportunities--not just those who filed whistleblower complaints. The record shows that the Commission had reasons for calling off the steward-ordered investigation that were unrelated to Rainey's and Hiatt's whistleblower complaint more than two years earlier.

Moreover, we must consider the passage of time in evaluating whether the employee's protected activity caused the employer's adverse action. *Kahn v. Salerno*, 90 Wn. App. 110, 130-31, 951 P.2d 321 (1998) (citing *Wilmot*, 118 Wn.2d at 69). The United States Supreme Court has held that a 20-month gap between the protected activity and an employer's adverse employment action suggests that the two are not connected. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273-74, 121 S. Ct. 1508, 149 L.

Ed. 2d 509 (2001). Here, the Commission's decision to call off the investigation occurred 27 months after Rainey and Hiatt filed their whistleblower complaint, also suggesting no connection. Finally, the Commission again provided a plausible explanation for its conduct that Rainey and Hiatt have not rebutted. And the Commission allowed its administrative investigation to continue after law enforcement concluded its investigation.

iii. December 2003 Extension of Emerald Downs' Employees' Licenses

Rainey and Hiatt claim the stewards lost work when the Commission extended the licenses of Emerald Downs' employees through the winter of 2003-04. Rainey said he believed that the grace period the Commission granted to licensees during that winter constituted retaliation for the May 2001 whistleblower complaint. Rainey and Hiatt argue that the grace period denied the stewards work.[15]

In December 2003, the Commission issued licenses for most of Emerald Downs' employees for the 2004 year. But not all individuals needing licenses came to the track on the day the Commission issued licenses. Lopez said that rather than schedule another day of work for the Racing License Specialist, the Commission decided "as a cost saving measure" to extend the duration of licenses from the previous season until February 2004, when commission offices at Emerald Downs reopened for the upcoming season. Former Executive Secretary Hartley Kruger stated that the decision to extend the duration of the license of several Emerald Downs' employees was a cost-saving measure based on the limited resources available and a desire to maximize efficient use of those resources. Furthermore, both Lopez and Kruger said that Hiatt, Rainey, and Moore performed the licensing work when they returned to work in February 2004.

[15] RCW 42.40.050(1)(k), which Rainey and Hiatt cite, states that "[d]enial of *employment*" constitutes a "reprisal or retaliatory action." The statute mentions nothing about denial of *work*.

As we have discussed, a 20-month gap between an employee's whistleblower complaint and the employer's adverse action suggests that the employee's complaint did not cause the employer's action. *Clark County Sch. Dist.*, 532 U.S. at 273-74. The Commission's decision to grant licensees a two-month grace period occurred 31 months after Rainey and Hiatt filed their whistleblower complaint. Thus, no reasonable juror could conclude that the Commission's December 2003 decision to extend licenses until the race track opened for the next season resulted from Rainey and Hiatt filing a whistleblower complaint in May 2001. The trial court properly dismissed Rainey's and Hiatt's claims relating to the Emerald Downs' employee license extensions.

iv. Temporary Employee Hired to Review and Revise the Rules of Racing

In May 2003, new Executive Secretary Robert Leichner hired Sara Olson as a temporary employee to compare and report on the similarities and differences of the current Washington Rules of Racing and the national model rules. Rainey and Hiatt argue that the Commission hired Olson during a period when Leichner said there were insufficient funds available to compensate additional work days for the stewards. They argue that the Commission's conduct in hiring Olson, instead of having the stewards perform the work, constituted a demonstrable adverse employment action.

Lopez said that the Commission had recalled Rainey and Hiatt to work in anticipation of the 2003 racing season and that their regulatory duties from March to the end of September of that year would have made it impossible for them to complete the Rules of Racing project in a timely manner. The project also required legal research, and the Commission wanted to hire someone with a law degree or a legal background to perform the work. Olson had recently graduated from law school and had passed the

Washington bar exam. Rainey and Hiatt do not have legal backgrounds and neither did any other commission employee. The Commission accepted Olson's report in August 2003, and terminated her shortly thereafter.

Again, Rainey and Hiatt confront the bar of a lengthy time gap between their complaint and the Commission's action. *See Clark County Sch. Dist.*, 532 U.S. at 273-74. The Commission hired Olson almost 27 months after Rainey and Hiatt filed their whistleblower complaint. Moreover, the Commission appears unassailable in deciding to hire a lawyer rather than lay persons to perform legal work. No reasonable juror could have concluded that the Commission hired the temporary lawyer to retaliate against Rainey and Hiatt.

v. Rainey's and Hiatt's Whistleblower & Retaliation Claims Against Leichner

Rainey contends that Executive Secretary Robert Leichner retaliated against him for filing a whistleblower complaint. Hiatt, on the other hand, expressly conceded that Leichner did not retaliate against him for filing the May 2001 whistleblower complaint. Leichner began working with the Commission on July 15, 2002, more than a year after Rainey and Hiatt filed their whistleblower complaint.

Rainey must show that those who made adverse employment decisions were aware that he had engaged in protected activity. *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003); *see also Clark County Sch. Dist.*, 532 U.S. at 273 (noting the significance of the absence of evidence that a plaintiff's supervisor knew about her opposition activity). Rainey fails to point to any evidence establishing that Leichner even knew that he and Hiatt had filed a whistleblower complaint. In addition, Rainey does not explain, in other than conclusory terms, what Leichner did to retaliate against him. *See Overton*, 145 Wn.2d at 430.

We conclude that the court properly

granted summary judgment as to this claim also.

III. Rainey and Hiatt's Motion to Strike

Rainey and Hiatt moved to strike portions of the Commission's affidavits, contending that the challenged parts contained inadmissible hearsay, were improper opinion testimony, or that the declarant was not competent to state the facts. We have carefully examined all of Rainey's and Hiatt's challenges and conclude that most lack merit; as to those that may have merit, the challenged evidence is not necessary to the outcome. Because of the number of challenges and their similarity, we do not address each. Instead, we set out several representative issues.

Rainey and Hiatt claim that Ron Crockett's declaration contains inadmissible hearsay. Crockett is the president of Emerald Downs. Crockett's declaration states that he and Emerald Downs vice president wrote a letter to the Commission explaining that they were upset with the way the stewards conducted the jockey search. The declaration also states that the Commission Chair responded to the letter and assured him that such occurrences would not happen again. These statements were not offered to prove the truth of the matter asserted. Rather, they were offered to show the course of the jockey's dispute with the stewards about the public search. Therefore, they are not hearsay. *See* ER 801(c).

Rainey and Hiatt contend that former Commission Chair Hartley Kruger's declaration contained inadmissible hearsay and opinion testimony and that Kruger was incompetent to testify to certain facts. As a member of the Commission, Kruger is competent, based on personal knowledge, to testify regarding actions the Commission took. Kruger's statements about the scope of the stewards' authority is irrelevant because chapter 260 WAC contains that information. Kruger's failure to provide the actual minutes of a commission meeting does not render him incompetent to testify regarding that meeting. He may testify based on his own personal

knowledge from having attended the meeting.

Kruger's statements that the Commission received complaints from employees and industry stakeholders were not offered to prove that the authors of those letters were employees or stakeholders. Because the Commission did not offer Kruger's statements to prove the truth of the matter asserted, they are not hearsay. *See* ER 801(c). The same is true for the independent investigator's report; the Commission attached a copy of the report to Kruger to show that an independent investigator submitted a report. The report is not offered for the truth of the statements contained therein. Accordingly, the report is not inadmissible hearsay as Rainey and Hiatt claim.

Rainey and Hiatt argue that Batson's declaration contained inadmissible hearsay and that he fails to lay an adequate foundation to support his testimony. Batson was essentially the Commission's Chief Operating Officer. Batson's declaration addresses the contents of the independent investigator's report. But Batson does not offer the contents of the report to prove the truth of the assertions contained therein. Batson's declaration states the conclusions that the investigator drew, but his declaration does not assert his belief that the conclusions were accurate. The investigator's conclusions are not offered for the truth of the matter asserted. *See* ER 801(c).

Batson's declaration states that veterinarians objected to the stewards' request for pre-race screening information. Rainey and Hiatt argue that Batson failed to lay a foundation demonstrating that he knew the nature of the objections. Regardless of whether Batson knew the nature of the objections, the veterinarians wrote the letter to the Commission and to Delores Sibonga in particular. Sibonga testified regarding the contents of the letter and attached the letter to her declaration. Thus, the problem with Batson's declaration, if any, does not affect the

outcome.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Quinn-Brintnall, C.J.

Penoyar, J.